

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOAQUIN HERNANDEZ-AYALA,

Case No. 3:13-cv-00134-MMD-WGC

Petitioner,

ORDER

v.

ROBERT LEGRAND, et al.,

Respondents.

Before the Court are the first amended petition for writ of habeas corpus (dkt. no. 11), respondents' motion to dismiss (dkt. no. 18), petitioner's opposition (dkt. no. 25), and petitioner's reply (dkt. no. 27). Also before the Court are petitioner's motion to stay (dkt. no. 26), respondents' opposition (dkt. no. 31), and petitioner's reply (dkt. no. 34). The Court finds that the one ground over which the parties contest exhaustion is exhausted. The Court finds that a stay is warranted for at least one of the grounds that the parties agree is not exhausted.

After a jury trial, petitioner was convicted of one count of sexual assault with a minor under 14 years of age and one count of lewdness with a child under the age of 14. Exh. 29 (dkt. no. 13). Petitioner appealed, and the Nevada Supreme Court affirmed. Exh. 45 (dkt. no. 13).

Petitioner then filed a proper-person post-conviction habeas corpus petition in state district court. Exh. 51 (dkt. no. 13). The state district court denied the petition. Exh. 57 (dkt. no. 13). Petitioner appealed. The Nevada Supreme Court reversed and

1 remanded for appointment of counsel. Exh. 59 (dkt. no. 13). The state district court
2 appointed counsel, who filed a supplemental habeas corpus petition. Exh. 63 (dkt. no.
3 14). The state district court then denied the petition again. Exh. 68 (dkt. no. 14).
4 Petitioner appealed, and the Nevada Supreme Court affirmed. Exh. 83 (dkt. no. 14).

5 Petitioner then commenced this action. The Court appointed counsel, who filed
6 the first amended petition (dkt. no. 12).

7 Respondents argue that petitioner has not exhausted his available state-court
8 remedies for grounds 5, 6, 7 and 9, and ground 1 in part. Before a federal court may
9 consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies
10 available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner
11 must fairly present that ground to the state's highest court, describing the operative
12 facts and legal theory, and give that court the opportunity to address and resolve the
13 ground. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Anderson v.*
14 *Harless*, 459 U.S. 4, 6 (1982).

15 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available
16 state remedies only if he characterized the claims he raised in state proceedings
17 *specifically* as federal claims. In short, the petitioner must have either referenced
18 specific provisions of the federal constitution or statutes or cited to federal case law.”
19 *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), *amended*,
20 247 F.3d 904 (9th Cir. 2001). Citation to state case law that applies federal
21 constitutional principles will also suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th
22 Cir. 2003) (*en banc*). “The mere similarity between a claim of state and federal error is
23 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional
24 principles, such as due process, equal protection, and the right to a fair trial, are
25 insufficient to establish exhaustion.) *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.
26 1999) (citations omitted).

27 Ground 1 is a claim that the police coerced petitioner into making incriminating
28 statements. Petitioner presented a similar claim on direct appeal. Exh. 41, at 16-17 (dkt.

1 no. 13). The difference, respondents argue, is that petitioner presented the claim to the
2 Nevada Supreme Court only as a matter of physical intimidation, and not also as a
3 matter of psychological pressure. The Court disagrees. First, as petitioner notes, both
4 he and the Nevada Supreme Court mentioned that a statement is involuntary if made
5 under psychological pressure. *Id.* at 16; Exh. 45, at 2 (dkt. no. 13). Second, petitioner
6 presented largely the same facts to the Nevada Supreme Court that he presented to
7 this Court. Third, the Nevada Supreme Court's analysis turned both on the lack of
8 visible injuries to petitioner and his demeanor during the interrogation. It is hard to see
9 how the Nevada Supreme Court's analysis could have been any different if either
10 petitioner or that court used the word "psychological" more than they actually did.
11 Ground 1 is exhausted.

12 The parties agree that grounds 5, 6, 7 and 9 are not exhausted. Instead, the
13 dispute is whether the Court should stay this action while petitioner returns to state court
14 to exhaust those grounds. To obtain a stay, petitioner must show that he has "good
15 cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and
16 there is no indication that the petitioner engaged in intentionally dilatory litigation
17 tactics.) *Rhines v. Weber*, 544 U.S. 269, 278 (2005). Regarding the third factor, the
18 court sees no indication that petitioner has been intentionally dilatory.

19 Ground 5 is a claim that counsel provided ineffective assistance because counsel
20 did not investigate the case sufficiently. In state court, petitioner did claim that counsel
21 failed to investigate the dislike that the victim's aunt had toward petitioner. In the first
22 amended petition, petitioner presents the same claim, but he has supplemented the
23 claim with declarations that have not been presented to the state courts. See Exh. 86-
24 89 (dkt. no. 14). Petitioner also has added a claim that counsel did not investigate the
25 victim's hypersensitivity to touch, which he has not presented to the state courts. The
26 declarations are from current counsel's investigator and from people who knew
27 petitioner, the victim, the victim's mother, and the victim's aunt. The information that
28 petitioner presents now is information that petitioner's state habeas corpus counsel

1 could have learned through investigation of the claim that trial counsel did not
2 investigate. In light of *Blake v. Baker*, 745 F.3d 977 (9th Cir.), *cert. denied* 135 S. Ct.
3 128 (2014), there is good cause to excuse the failure to exhaust because state post-
4 conviction counsel did not find this information.

5 The Court also finds that ground 5, as presented now, is a colorable claim of
6 ineffective assistance of counsel. Respondents argue that the Court should not consider
7 the declarations when determining whether ground 5 has potential merit, but the Court
8 sees no other way to evaluate the potential merit of an unexhausted claim. Indeed, as
9 petitioner notes, during the state habeas corpus proceedings the respondents twice
10 argued that petitioner had failed to present any evidence in support of the claim. See
11 Exh. 53 at 6-7 (dkt. no. 13); Exh. 64 at 4 (dkt. no. 14). The claim might be shown to
12 have no merit, but that is not a decision that the Court can make at this moment.

13 Given that a stay is warranted for the exhaustion of ground 5, the Court need not
14 inquire any further on grounds 6, 7 and 9.


15 It is therefore ordered that the motion to dismiss (dkt. no. 18) is granted in part.
16 Grounds 5, 6, 7 and 9 are unexhausted.

17 It is therefore ordered that petitioner's motion to stay (dkt. no. 26) is granted.

18 It is further ordered that this action is stayed pending exhaustion of the
19 unexhausted claims. Petitioner shall return to this Court with a motion to reopen within
20 forty-five (45) days of issuance of the remittitur by the Nevada Supreme Court at the
21 conclusion of the state court proceedings. Further, petitioner or respondents otherwise
22 may move to reopen the action and seek any relief appropriate under the
23 circumstances.

24 It further is ordered that the Clerk of Court shall administratively close this action
25 until such time as the Court grants a motion to reopen the action.

26 DATED THIS 11th day of March 2015.

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28 
MIRANDA M. DU
UNITED STATES DISTRICT JUDGE